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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 575

AMERICAN SURETY COMPANY OF NEW YORK, a corporation, *Petitioner*,

v.

SUNDBERG & SONS, a partnership, et al., and the UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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November 27, 1961

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AMERICAN SURETY COMPANY OF NEW YORK,
a corporation, *Petitioner,*

v.

SUNDBERG & SONS, a partnership, et al., and the
UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

Petitioner seeks a writ of certiorari to review the judgment of the Supreme Court of the State of Washington.

OPINION BELOW

The opinion of the Supreme Court of Washington (Appendix A, *infra,* pp. 1a-15a) is reported at 57 Wash. (2d) 335; 363 P (2) 99.

JURISDICTION

Petition for rehearing was denied on August 29, 1961. The judgment of the Supreme Court of Washington was entered on August 31, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

1. Whether a conventional mortgage to secure future advances is subject to the choateness rule heretofore applied under Sections 6321-22, Internal Revenue Code, 1954, or whether it is an exception under Section 6323(a), and thus not subject to the choateness rule.

2. Whether it is necessary to determine, according to State law, the beneficial ownership of property, as between a taxpayer-mortgagor and a mortgagee, before the choateness rule may be invoked.

3. Whether a State court may determine according to State law that a mortgage to secure future advances is effective from its date of execution, and then hold that federal law requires the application of the federal rule of choateness for purposes of federal taxation.

4. Whether income received by a mortgagee from a third party, by reason of a previous express assignment from the mortgagor, as well as by operation of law, may be treated by the Court as payment of mortgage-secured debts in such a way as to dissolve the priority of the mortgage, advance the position of the tax lien, and thus abrogate the doctrine of "first in time is first in right."

5. Whether a federal tax lien filed only in the name of a partnership reaches property belonging to individual partners.

STATUTES INVOLVED

Sections 6321, 6322, 6323 (a) and 6303, of the Internal Revenue Code of 1954, are set forth in Appendix B, *infra*, pp. 15a-17a.

STATEMENT OF THE CASE

* The partnership of Oscar Sundberg & Sons (hereinafter referred to as "Sundberg") entered into a contract with Boeing Airplane Company (hereinafter referred to as "Boeing") to do certain painting work at a contract price of $341,569. Performance and payment bonds were furnished, in a penalty of the same amount, on which petitioner, American Surety Company of New York, (hereinafter referred to as "American") was named as surety, guaranteeing completion of the work according to contract, and payment of labor and material bills incurred in connection with the work.

On July 14, 1955, Sundberg notified American that it could not continue the contract work and requested financial assistance. On the same date American advanced $9,000 with the understanding that the sum would be secured by a mortgage; on July 19 an additional $3,077.74 was advanced, with the understanding between American and Sundberg that additional sums would be advanced from time to time to complete the

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* The facts contained in this Statement are taken from the agreed statement of facts appearing at pages 39-42 of the Record filed herewith; and from Exhibit 11 of the Record filed herein, page 76, which was bound out-of-place in the Record, following page 67.

Boeing contract and pay labor and material bills. On the same date, July 19, Sundberg executed an assignment to American of all sums due or to become due from Boeing under the aforesaid contract, and at the same time each of the three partners of Sundberg executed separate mortgages to American (identical in their provisions) on property which each of the three individually owned. In pertinent part the mortgages all stated they were in consideration of the sums already advanced by American, and "in consideration of further advances to be made."

These three mortgages were duly recorded in King County, Washington, on July 20, 1955, and in addition, one of the mortgages was recorded in Island County, Washington, on July 21, 1955.

Subsequent advances were made by American as follows: On July 21, 26, August 2 and 9, the sums of $10,800, $7,200, $3,300 and $2,200, respectively, for which promissory notes were furnished. The notes stated on their face that they were secured by the mortgages described above.

After these advances were made directly to Sundberg, American also paid labor and material bills incurred by Sundberg in connection with the Boeing contract, and paid other expenses connected with completion of the contract work, in a total amount of $127,598.47, the last material bill having been paid on April 5, 1956. The total outlay by American was $163,316.75, of which it recouped mostly from Boeing the sum of $106,747.23, leaving a difference of $56,569.52, for which it obtained a judgment in this proceeding.

The District Director of Internal Revenue for the Seattle District assessed withholding and unemploy-

ment taxes (with penalties and interest) and filed notices of tax lien as follows:*

Tax	Period	Amount of Tax	Lien No.	Assessment Date	Date Notice of Tax Lien Filed King County
Withholding	6/30/55	$22,626.20	SE-1201-55	8/31/55	10/26/55
Withholding	9/30/55	16,105.99	SE-1430-55	11/30/55	1/ 4/56
Withholding	12/31/55	3,045.08	SE- 321-56	3/ 8/56	3/21/56
Unemployment	1955	1,380.35	SE- 457-56	3/23/56	4/18/56
Unemployment (add'l)	1955	756.99		7/15/57	

It will be observed that the date of recordation of the mortgage (July 20, 1955) antedated both the earliest assessment date (August 31, 1955) and the earliest notice of lien (October 26, 1955).

The Court below worked out a schedule of priorities based on what seems to petitioner an erroneous legal premise. The schedule is set forth in the opinion of the Court (See Appendix A, *infra*, pp. 12a-13a). The schedule is based on the theory that the mortgage involved in this case was a lien, part choate and part inchoate, choate so far as money actually advanced by American prior to the date of an intervening notice of lien is concerned, but inchoate as to money advanced subsequent to the date of notice of an intervening lien.

Petitioner submits that a conventional mortgage, such as the lower Court found this to be, is not in the category of liens falling under Sections 6321-22 of the Code, and subject to the choateness test. A mortgage is a transfer of property, and it falls within the exception stated in Section 6323 (a) of the Code, and thus is not subject to the choateness test.

* The following amounts reflect payments made by the taxpayer after the assessment date.

REASONS FOR GRANTING THE WRIT

I

The main question presented here has not been previously determined by this Court, and it involves an important provision of the federal revenue laws that needs uniform application throughout the country. The Supreme Court of the State of Washington has erroneously construed Sections 6321-22-23 (a) of the Internal Revenue Code, 1954, thinking the conclusion it reached was compelled by the decisions of this Court in such cases as *United States* v. *Security Trust & Saving Bank,* 340 U.S. 47 (1950); *United States* v. *City of New Britain,* 347 U.S. 81 (1954); *United States* v. *Acri,* 348 U.S. 211 (1955); *United States* v. *Scovil,* 348 U.S. 218 (1955); *United States* v. *Colotta,* 350 U.S. 808 (1955); *United States* v. *White Bear Brewing Co.,* 350 U.S. 1010 (1956); *United States* v. *Vorreiter,* 355 U. S. 15 (1957); *United States* v. *Ball Construction Co., Inc.,* 355 U.S. 587 (1958). In reaching its conclusions the Court below also leaned heavily on the decisions in *United States* v. *Bond,* (4 Cir) (1960) 279 F(2) 837; and *United States* v. *Christensen,* (9 Cir) (1959) 269 F(2) 624.

Most of the previous decisions of this Court cited above dealt with Sections 6321-22 of the Revenue Code, whereas this case involves Section 6323 (a). In the previous cases the Court was dealing with the priority of the federal tax lien as compared with state-created liens such as mechanics liens, attachments, landlord's liens, and the like. The Circuit Court decisions which the Court below chose to follow involved factual circumstances closer to those presented here, as did the decision of this Court in *Ball Construction Company, supra,* but even so there are controlling differences

which distinguished this case. The last-mentioned cases either did not involve a conventional mortgage, or there were complicating factors connected with the necessity for the mortgage to pay delinquent taxes, or attorneys' fees, that took the cases out of what might be termed the classic category of a mortgage.

The type of mortgage involved here (Appendix C, *infra*, pp. 17a-18a) has been recognized by Washington courts (including the lower Court in this case) as valid to secure future advances against subsequent liens or encumbrances since 1899, when the Supreme Court of the State of Washington decided *Home Savings & Loan Association* v. *Burton* 20 Wash. 688, 698; 56 P. 940. For later cases to the same effect: *Eltopia Finance Co.* v. *Colley*, (1923) 126 Wash. 554, 219 P. 24, and *Carey* v. *Herrick*, (1928) 146 Wash. 283, 263 P. 190.

This Court likewise recognized the conventional character of a mortgage to secure future advances as early as 1828, when it said in *Conard* v. *Atlantic Insurance Co.*, 26 U.S. (1 Pet.) 386, 448, "First, it is said that this debt upon a *respondentia* bond is of too contingent a nature to uphold a mortgage, as collateral security for the payment of it. We know of no principle or decision that justifies such a conclusion. *Mortgages may as well be given to secure future advances and contingent debts, as those which already exist, and are certain and due.*" (Emphasis supplied)

Since the instrument under consideration here is a mortgage, it necessarily comes within the exception stated in Section 6323 (a) of the Internal Revenue Code, and is not affected by a subsequently filed and recorded tax lien. Or to state it another way, it is not such a competing "lien" with the tax lien as would give

rise to the application of the choateness doctrine. This choateness doctrine applies to competing liens under Section 6321-22, not to exceptions enumerated in Section 6323 (a).

II

The Court below has erred in treating the present instrument as a lien and nothing more. The opening sentence of the decision refers to it as a lien: "The issue here is whether a mortgage was made to secure future advances and, if it was, whether United States tax liens take priority over the mortgage lien as to advances made subsequent to the filing of the United States tax lien."

It is well-known that a conventional mortgage is more than a lien. This Court said in *Conrad* (page 441):

> "* * * The same doctrine may be deduced from the case of *United States* v. *Fisher*, (2 Cranch 358) where the Court declared, that 'no *bona fide* transfer of property in the ordinary course of business is overreached by statutes;' and 'that a mortgage is a conveyance of property, and passes it conditionally to the mortgagee.' If so plain a proposition required any authority to support it, it is clearly maintained in *United States* v. *Hooe*, (3 Cranch 78). It is true, that in discussions in Courts of Equity, a mortgage is sometimes called a lien for a debt. And so it certainly is, and something more; it is a transfer of the property itself, as security for the debt."

Since a mortgage constitutes a transfer of property rather than a lien, and because of the express language of the section itself, it falls within Section 6323(a), and is outside the choateness rule customarily applied to competing liens under Sections 6221-22.

III

The Court below likewise erred in failing to apply the doctrine announced by this Court in *Aquilino* v. *United States* (1960) 363 U.S. 509 and *United States* v. *Durham Lumber Co.*, (1960) 363 U.S. 522, although the same lower Court, in a decision preceding this one by only a few months, correctly applied the rule of *Aquilino*, in *Johnson Service Company* v. *Roush*, (1960) 355 P (2) 815. If this mortgage is more than a lien, and constitutes a transfer of the real property, then the real property was not available to pay the taxes of the taxpayer. It was not his property for this purpose. *Morgan* v. *Commissioner*, 309 U.S. 78; *United States* v. *Bess*, 357 U. S. 51. In any event, according to *Aquilino* and *Durham* it was incumbent upon the Court below to make a finding regarding the property interest of the taxpayer in the real estate before judging competing liens according to the choateness test. This it did not do.

IV

If it be assumed, for the purpose of argument only, that petitioner held nothing but a lien, that it did not hold a mortgage, and that the principle of "first in time is first in right" *(New Britain case)* applies, then an additional point needs consideration. What this doctrine means under the present decisions is that the first choate lien takes precedence over subsequent choate liens.

In the present case American made advances to Sundberg, prior to the date the tax lien was recorded, far in excess of that allowed by the Court. The amount of these prior advances was reduced by the Court on the theory that in the interim American received cer-

tain monies from Boeing that should be treated as repayment by Sundberg of mortgage-secured debts.

It will be remembered that in addition to the direct advances made to Sundberg, for which notes were obtained, American also paid labor and materialmen directly in substantial amounts. In turn, American received from Boeing contract payments and retained percentage in substantial amounts.

The Court below held that on the theory of "first in first out" this money received from Boeing must be applied first against the earliest advances made to American. This had the effect of wiping out the priority of most of the initial advances made by American prior to the initial filing date of the tax lien, and moving the tax lien to the front position. In other words, by thus allocating the income received by American, the Court altered the normal application of the "first in time is first in right" rule.

What made it so wrong to do so in this case was the fact that the money received by American was already its own money. It could not be made the subject of allocation by the Court, on the theory that American was receiving a repayment of mortgage-secured money from Sundberg. At the time Sundberg executed the mortgage in question, it at the same time and on the same date, July 19, 1955, likewise executed an assignment to American of all monies due or to become due under the Sundberg contract with Boeing. Aside from this, and by operation of law, beneficial title to these contract monies had become the property of American at the time it received the payments from Boeing. Since American had by this time paid labor and material bills in large amounts, it was, in law, subrogated to all of Sundberg's right, title and interest in the

money. This is the law of the State of Washington (*Levinson* v. *Linderman*, (1958) 51 Wash 2nd 855, 322 P. (2) 863, 868; *Johnson Service Company* v. *Roush*, (1960) 355 P. (2) 815), and it has been so recognized by this Court on many occasions. *Henningsen* v. *U. S. F. & G. Co.*, 208 U.S. 404; *Prairie State Bank* v. *United States*, 164 U.S. 227; *American Surety Company* v. *Sampsell*, 327 U.S. 269.

Since this income to American from Boeing was already American money by reason of the express assignment and by operation of law, the Court below was in basic error when it dissolved American's priority in time on the theory that this was Sundberg money that should and could be immediately applied to the payment of the earliest mortgage-secured advances.

The mortgage secured all advances made by American, whether directly to Sundberg, or on his behalf directly to labor and materialmen. But the monies coming from Boeing had been made the subject of an assignment, both express and by operation of law, and so could not be regarded as free money available for allocation by the Court.

If the mortgage is to be treated as a lien, then it should be allowed the benefits of the "first in time is first in right" rule, to the extent it was choate, without diminution by the Court in the manner described above.

V

Petitioner also makes the point that the Government failed to file its notices of lien in accordance with the requirement of the statute. The real property covered by the mortgages was in the name of the individual partners in each case. The notices admittedly named the partnership only.

Here, too, is a question that seems never to have been determined by this Court, involving the proper application of Sections 6321 and 6303 (a), Internal Revenue Code, 1954, which states in part that notice shall be given "to each *person* liable for the unpaid tax." (Emphasis supplied) Whether notice to a partnership is sufficient to bind the real property of each person who is a member of the partnership is the question. The Supreme Court of the State of Washington has decided this question in the affirmative. A uniform construction of the revenue laws of the United States would seem to require a determination of this federal question by this Court. In this connection see *Little Lake Lumber Co.* v. *Baugh*, decided by the Ninth Circuit Court of Appeals, October 18, 1961, Case No. 17230, wherein under closely analogous circumstances the Court held that the notice was insufficient to bind the partnership. Also see *United States* v. *Worley*, Cir 6, 213 F(2) 509.

CONCLUSION

For the foregoing reasons this petition for writ of certiorari should be granted.

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November 27, 1961

APPENDIX A

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

No. 35582

Department One

Filed June 22, 1961.

AMERICAN SURETY COMPANY OF NEW YORK,
a corporation, *Respondent*,

v.

OSCAR SUNDBERG ET AL., *Defendants*,

THE UNITED STATES OF AMERICA, *Appellant*.

The issue here is whether a mortgage was made to secure future advances and, if it was, whether United States tax liens take priority over the mortgage lien as to advances made subsequent to the filing of the United States tax liens. There are also questions raised as to the validity of the United States tax liens and the effectiveness of the notice given.

In February, 1955, Oscar Sundberg, Thor Sundberg, and Carl Sundberg (doing business as Oscar Sundberg and Sons, a partnership) entered into a contract with the Boeing Airplane Company to do certain painting for the sum of $341,569. The Sundbergs, as principals, entered into a performance bond with the American Surety Company, hereinafter referred to as the surety, by the terms of which, if the Sundbergs were unable to perform the contract, the surety was required to complete it or cause it to be done.

July 14, 1955, the Sundbergs being without sufficient funds to meet labor expenses, the surety advanced $9,000 to them, it being agreed that this sum would be secured by a mortgage.

July 19, 1955, the Sundbergs obtained another advance of $3,077.74; Thor Sundberg, on behalf of himself and the other partners, assigned to the surety all of their claims

against Boeing; and each of the Sundbergs executed mortgages in favor of the surety on real property which they individually owned. Three of the mortgages were recorded in King County on July 20, and the fourth in Island County on July 21. The mortgages, which were practically identical except for the mortgagor's name and the property described, stated that they were made in consideration of the $9,000 advanced July the 14th:

> "• • • and in further consideration of the advance at this time of Three Thousand and Seventy-Seven and 74/100 ($3,077.74) Dollars, *and in consideration of further advances to be made,* and to secure the total sum now advanced amounting to Twelve Thousand and Seventy-Seven and 74/100 ($12,077.74) Dollars, according to the terms of promissory note bearing date of July 19, 1955, • • •" (Emphasis supplied.)

July 21, the Sundbergs received a further advance of $10,863.37. A promissory note was given on that date to the surety in the sum of $22,941.11 (the sum of the advances made July 14, 19, and 21).

Additional advances were made to the Sundbergs on July 26, August 2 and 9; the amounts being $7,254.14, $3,314.58, and $2,208.45 respectively. A separate note was given for each of these advances. No other notes were given to the surety and no further advances were made direct to the Sundbergs. Each of these notes, together with the earlier note for $22,941.11, was signed by all of the partners. Each note provided for interest at five and one-half per cent until maturity and six per cent thereafter, and for a reasonable attorney's fee in the event of suit thereon. Each note also stated that it was "secured by mortgages on real estate and a chattel mortgage on personal property." (The record in this case is silent as to any chattel mortgage. The notes have no significance except as they bear on the question as to whether the mortgages were to secure future advances, as the action brought by the surety is clearly not an action on the notes.)

The surety made payments after August 9 (totalling $127,598.47), most of them directly to materialmen (the

last payment for material being on April 5, 1956, from which date the interest allowed by the judgment is computed). This included also payments in the sum of $11,175.31 to attorneys (made during 1957 and 1958[1]) and $130 for title reports made November 28, 1958, less than a month before these foreclosure proceedings were commenced. However, no specific item is questioned and the total amount which the surety had to pay to complete the contract is conceded to be $163,316.75.

The surety brought this action, asking for a judgment for the difference between the sum total of the payments made to complete the contract and the credits and payments it received on account of the contract (mostly from the Boeing Airplane Company), totalling $106,747.23.

The amount thus received by the surety must be credited on the first $106,747.23 advanced by the surety to complete the contract.[2] The judgment against the Sundbergs is for the portion remaining unpaid, $56,569.52. This amount was all advanced by the surety on or after December 6, 1955, as shown by the schedule of payments (exhibit No. 11), conceded to be correct.

Prior to December 6, 1955, the United States had assessed withholding taxes[3] against Oscar Sundberg and Sons in the sum of $22,626.20, payment of which was not made although notice and demand was made therefor. A notice of this tax lien was filed in the auditor's office of King County October 26, 1955, and in the auditor's office of Island County on February 17, 1959.

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[1] This general statement is subject to the exception that $650 of the attorney's fees was paid December 13, 1955.

[2] Bellingham Securities Syndicate, Inc. v. Bellingham Coal Mines, Inc., 1942, 13 Wash. 2d 370, 125 P. 2d 668; Whiting v. Rubinstein, 1941, 10 Wash. 2d 5, 116 P. 2d 305; Diettrich Bros. Inc. v. Anderson, 1935, 183 Wash. 574, 48 P. 2d 921; Restatement, Contracts, 743, § 394.

[3] "Withholding" taxes are imposed on wages pursuant to §§ 3401-3404 of the Internal Revenue Code of 1954. 26 U.S.C.A. (1958 ed.) 3401-3404.

The United States claimed priority in the proceeds of the sale of the mortgaged property in King County, not only for this tax lien which was assessed and notice thereof filed in King County prior to the payment of any portion of the $56,569.52, for which the surety has judgment, but for other tax liens listed as follows:

Tax	Outstanding amount of tax	Assessment date	Notice of tax lien filed in King County	Notice of tax lien filed in Island County
Withholding	$16,105.99	11-30-55	1- 4-56	2-17-59
Withholding	3,045.08	3- 8-56	3-21-56	2-17-59
Unemployment[4]	1,380.35	3-23-56	4-18-56	2-17-59
Unemployment	756.99	7-15-57		2-17-59

The trial court, after entering judgment for the surety against the Sundbergs in the sum of $56,569.52, entered a decree foreclosing the mortgages and ordered that the property covered by the mortgages be sold and that the proceeds of the sale of the King County property be applied in the following order of priority: (1) The surety's judgment, together with interest and a $5,600 attorney fee; (2) a United States tax lien for $22,626.20, with interest, notice of which was filed in King County October 26, 1955; (3) a United States tax lien for $16,105.99, with interest, notice of which was filed in King County January 4, 1956; (4) B. F. Tilley's judgment for $4,649.88, with interest, entered in King County March 6, 1956; (5) the remaining tax liens of the United States for $3,045.08 and $1,380.35, with interest, notice of which was filed in King County March 21, 1956, and April 18, 1956, respectively; and a tax assessed July 15, 1957, in the amount of $756.99 with interest, no notice of which was filed in King County.

The United States appeals, so far as the priorities to the proceeds of the mortgaged property in King County are

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[4] "Unemployment" taxes are imposed by the Federal Unemployment Tax Act, §§ 3301-3308 of Internal Revenue Code of 1954. 26 U.S.C.A. (1958 ed.), §§ 3301-3308.

concerned, urging that the mortgages given by the Sundbergs to the surety were not effective to secure future advances as against the claim of its intervening liens and that, in any event, its lien for $22,626.20 had first priority on the proceeds of the sale.

We will, however, first consider the contentions made by the surety as to the validity of the tax lien and the effect of the notice filed. It was urged at the trial court level that since the tax lien notices, which were filed as required by § 6323 of the Internal Revenue Code of 1954 (26 U.S.C.A. (1958 ed.), § 6323), used the name of Oscar Sundberg and Sons, they were not effective as notice of the government's liens on property belonging to the individual partners.

This issue was disposed of adversely to the surety by the trial court. It appears to raise the same issue in this court under the heading in its brief "Tax Lien Notices Were Invalid," and then argues an entirely different proposition, i. e., that there was no lien on the individual property of the partners because the demand for payment of the taxes (required by §§ 6303 and 6321 of Internal Revenue Code of 1954) was not made on the individual partners.

The latter point seems never to have been brought to the attention of the trial court, and, hence, is not properly before this court. However, neither contention has any merit.

§ 6321 of the Internal Revenue Code of 1954 provides for a lien for the taxes under consideration:

> "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person. * * *"

§ 6322 of the Internal Revenue Code of 1954 provides for the period of the lien:

> "Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time. * * * "

The surety emphasized the first part of § 6321, i. e., a refusal to pay after demand, as being a prerequisite to a lien, and urges that no demand was made upon the individual partners.

There is no question but that general partners are individually liable for the taxes due the United States from the partnership. 26 U.S.C.A. § 701. Underwood v. United States, 5 Cir., 1941, 118 F. 2d 760.

A demand on the partnership is a demand upon all of the partners and is a sufficient compliance with the terms of both § 6321 and § 6303 of the Internal Revenue Code of 1954,[5] for the purpose of making the taxes assessed a lien on the property of the individual partners.

Such liens are secret liens, but were good under Federal law even as against a subsequent *bona fide* purchaser or an encumbrancer in good faith (United States v. Snyder, 1893, 149 U.S. 210, 13 S. Ct. 846, 37 L. Ed. 705) until in 1913 when Congress acted to protect a mortgagee, purchaser, or judgment creditor (and a pledgee was added in 1939) against

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[5] § 6303 of the Internal Revenue Code of 1954, so far as material, reads:

"(a) General rule.—Where it is not otherwise provided by this title, the Secretary or his delegate shall, as soon as practicable, and within 60 days, after the making of an assessment of a tax pursuant to section 6203, give notice to each person liable for the unpaid tax, stating the amount and demanding payment thereof. Such notice shall be left at the dwelling or usual place of business of such person, or shall be sent by mail to such person's last known address."

such secret liens. See § 6323 of the Internal Revenue Code of 1954, 26 U.S.C.A. § 6323.[6] A notice of the United States liens, using the name of the partnership (Oscar Sundberg and Sons) was notice not only to anyone dealing with Oscar Sundberg, but also to those dealing with Carl and Thor Sundberg or their property, as mortgagee, pledgee, purchaser, or encumbrancer. Richter's Loan Company v. United States, 5 Cir., 1956, 235 F. 2d 753; United States v. Jane B. Corporation, D.C. Mass. 1958, 167 F. Supp. 352. The rule is that the existence, effectiveness, and relative priority of Federal tax liens represent Federal questions. United States v. Rasmuson, 8 Cir., 1958, 253 F. 2d 944; United States v. Acri, 1955, 348 U.S. 211, 75 S. Ct. 239, 99 L. Ed. 264; United States v. Gilbert Associates, Inc., 1953, 345 U.S. 361, 73 S. Ct. 701, 97 L. Ed. 1071; United States v. Security Trust & Savings Bank, 1950, 340 U.S. 47, 71 S. Ct. 111, 95 L. Ed. 53.

While not relevant here, it would seem that such notices were probably adequate under Washington law, since notice sufficient to excite attention and put a person on guard, or to call for an inquiry is notice of everything to which such inquiry might lead. First National Bank of Kelso v. Hart, 1925, 137 Wash. 110, 118, 241 P. 675; Tjosevig v. Butler, 1934, 180 Wash. 151, 38 P. 2d 1022.

Passing from the question of the validity of the tax liens, and the sufficiency of notice thereof, we must, before we

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[6] "(a) Invalidity of lien without notice.—Except as otherwise provided in subsection (c), the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate.

"(1) Under state or territorial laws.—In the office designated by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law designated an office within the State or Territory for the filing of such notice;"

(It is conceded that the office of the county auditor is the proper place for the filing of such notices in this state; and that the filings of the notices in that office were on the dates indicated in the opinion.)

take up any consideration of priorities between the tax liens of the United States and the mortgages, first consider the primary issue raised by the United States: Were these actually mortgages to cover future advantages?

The trial court concluded that they were mortgages to secure future advances and, relying on Home Savings & Loan Ass'n v. Burton, 1899, 20 Wash. 688, 56 P. 940; Eltopia Finance Co. v. Colley, 1923, 126 Wash. 554, 219 P. 24, and Carey v. Herrick, 1928, 146 Wash. 283, 263 P. 190, held that the priority related back to the date of the mortgage since the payments made were obligatory rather than optional. Elmendorf-Anthony Co. v. Dunn, 1941, 10 Wash. 2d 29, 116 P. 2d 253, 138 A.L.R. 558.

The United States urges that the rule of relation back should be limited, and in some states it is, to situations where the mortgage fixes a limit to the amount of the advances to be secured or states a definite purpose that is to be accomplished, such as the completion of a building or a contract. One authority says:

> "If the limit be not defined in any way, it can be good only for the advances made at the time, and such others as may afterward be made before any other incumbrances are made upon the property mortgaged. • • • " 1 Jones on Mortgages (8th ed.) 595, § 458.

In the present case, the amount of the advances already made at the time the mortgage was signed was $12,077.74, and while the mortgages stated that they were made "in consideration of further advances to be made," they did not say that they were to secure such advances, but only that they were:

> " • • • to secure the payment of Twelve Thousand and Seventy-Seven and 74/100 ($12,077.74) Dollars so advanced according to the terms of promissory note bearing date of July 19, 1955.[7] • • • "

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[7] There was no note bearing date of July 19th. See pages 2 and 3 for description of the notes delivered by the Sundbergs to the surety.

There was no specific limitation, no mention of the surety contract, or the painting contract, or anything else which would put a searcher of the record on notice that the mortgage might cover advances of over $160,000.

However, we cannot agree with the United States that these mortgages were not made to secure the advances made and to be made by the surety in the completion of the contract. The mortgages were made on the same day (July 19, 1955) that the partnership assigned[8] all of their claims against Boeing to the surety. The four notes made by the Sundbergs, to which we have referred, were all subsequent to the mortgage and all recited that they were "secured by mortgages on real estate and a chattel mortgage on personal property"; and the mortgages being foreclosed were the only mortgages executed, insofar as the record discloses. As between the parties, these were mortgages to secure future advances, and we think that the statement in the mortgages—that they were made in consideration of advances thereafter to be made—is sufficient notice to subsequent encumbrancers that they were intended to secure future advances.

We come now to the consideration of whether the lien of the mortgages for future advances was prior or subordinate to the lien for United States taxes, the notices of which were filed after the mortgages but before certain future advances were made.

There can be no question but that under Washington law, if the mortgages were made to secure future advances, the trial court was eminently justified in its determination that all advances under the mortgages related back, so far as the lien was concerned, to the date of the mortgage. This position is supported by substantial authority as pointed

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[8] It was strenuously urged that such an assignment itself constituted a mortgage (under § 6323) in United States v. R. F. Ball Construction Co., 1958, 355 U.S. 587, 78 S. Ct. 442, 2 L. Ed. 2d 510, and a United States District Court and Circuit Court so held. The Supreme Court of the United States, with four judges dissenting, held that the assignment was not a mortgage.

out in 4 Pomeroy's Equity Jurisprudence (5th ed.), § 1199, p. 596:

> "Finally, there are decisions by most able courts which give the prior mortgage to secure future advances an absolute preference; which maintain the mortgagee's supremacy, and preserve the lien of his mortgage against intervening subsequent encumbrances, even for advances made after receiving actual notice of such encumbrances. This conclusion is based upon the doctrines that the executory agreement of the mortgagee creates a full and perfect lien in equity, effectual against all persons who are charged with notice thereof, and that the record of the mortgage furnishes such a notice affecting all subsequent encumbrances."

However, "most able courts" must bow to the reality that the United States is not to be frustrated in the collection of revenue by the tax priority laws of fifty different states. The relative priority of the tax liens of the United States presents a Federal question to be determined by the Federal courts. United States v. Security Trust & Savings Bank, supra; United States v. Acri, supra; People of State of Illinois ex rel. Gordon v. Campbell, 1946, 329 U.S. 362, 371, 67 S. Ct. 340, 91 L. Ed. 348.

For a competing lien to take precedence over a Federal tax lien, it must not only be prior in point of time but it must also be perfected and choate.

It was in a case from this state[9] that the United States Supreme Court "launched the doctrine of the inchoate and general lien."[10] The competing lien must be definite (and not merely ascertainable in the future) in at least three respects as of the crucial time (the filing of the notice of the lien for United States taxes required by § 6323): identity of lienor, amount of the lien, and the property to which it

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[9] Spokane County v. United States, 1929, 279 U.S. 80, 49 S. Ct. 321, 73 L. Ed. 621.

[10] 63 Yale Law Journal 911 (1954).

attaches. People of State of Illinois ex rel. Gordon v. Campbell, supra.

As pointed out in United States v. Ringler, D.C.N.D. Ohio 1958, 166 F. Supp. 544, the United States Supreme Court has not, as yet, passed upon the question involving the relative priority of a tax lien and a mortgage to secure future advances, where the tax lien was filed subsequent to the recording of a mortgage given to secure future advances but prior to advances for which a lien is claimed.

In the Ringler case, the mortgage was limited in amount to $20,000 and was to secure the payment of attorney's fees for services to be thereafter rendered. The mortgage was recorded June 18, 1953, and the notice of lien for United States taxes filed August 5, 1953. In an action to foreclose the tax lien (the taxes amounting to more than the value of the mortgaged property), the evidence was that the value of the legal services rendered the mortgagor, after the mortgage, was about $10,000 and that the value of the services rendered between June 18, 1953, and August 5, 1953, was $1,600. The court, after stating the rule (applied by the trial court in this case) that a mortgage to secure future advances which the mortgagee is obligated to make, takes priority over a subsequent lien recorded before the future advances were made, said (at page 548):

> "• • • However, whenever a question involving the relative priority of United States tax liens and other liens arises, courts are required to apply the test of choateness to the competing liens. Applying that test here, it must be held that as to the indefinite future advances (in the form of legal services) which were to be made after August 5, 1953, the mortgage lien is subordinate to the tax lien of the United States. The lien of the mortgage securing the value of services rendered between June 18, 1953 and August 5, 1953 stands on a different footing. As shown by the record, on August 5, 1953, legal services of the value of $1,600 had been rendered by the mortgagees in reliance upon the security of the mortgage. To that extent, therefore, the mortgage lien was not inchoate or imperfect.

I am of the opinion that as to the amount of the mortgage lien securing such indebtedness the rule of first in time—first in right, applies. * * * "

Because of the lack of certainty as to whether future advances would be made and, if so, the amount thereof, the lien priority cases from this court relied upon by the trial court are inapplicable insofar as the liens of the United States for taxes are concerned.

Priority here is governed, so far as the United States tax liens are concerned, by the rationale of those Federal cases which hold that the lien of a prior mortgage must be subordinated to Federal tax liens where the mortgage lien is inchoate at the time the notice of the Federal tax lien is filed. United States v. Bond, 4 Cir., 1960, 279 F.2d 837; United States v. Christensen, 9 Cir., 1959, 269 F.2d 624; United States v. Ringler, supra; see also Metropolitan Life Insurance Company v. United States, 1959, 9 A.D.2d 356, 194 N.Y.S.2d 168, applying the Federal law.

Thus the priorities, as they relate to the property in King County covered by the mortgages foreclosed in this action, would be:

(1) The United States tax lien, notice of which was filed for record on October 26, 1955, prior to the advancement of any portion of the last $56,569.52 advancement by the surety	$22,626.20
(2) The lien of the mortgage for that portion of the last $56,569.52 advanced by the surety, which was advanced between October 26, 1955, and January 4, 1956, when notice of the second of the United States tax liens was filed for record	25,376.35
(3) The United States tax lien, notice of which was filed for record January 4, 1956	16,105.99
(4) The lien of the mortgage for that portion of the advances made by the surety be-	

tween January 4, 1956 and March 21, 1956, when notice of the third of the United States tax liens was filed for record	9,775.57
(5) The United States tax lien, notice of which was filed for record March 21, 1956 ..	3,045.08
(6) The United States tax lien, notice of which was filed for record April 18, 1956 ..	1,380.35
(7) The lien of the mortgage for the remainder of the advances made by the surety after the notice of the United States tax lien was filed for record April 18, 1956	21,417.60
(8) Lien of the B. F. Tilley judgment,[11] entered March 6, 1956, together with interest and costs	4,649.88
(9) The unrecorded United States tax lien assessed July 15, 1957, but not filed for record in King County	756.99

Each of the government's liens would carry with it the penalties and accrued interest; each segment of the mortgage lien would carry with it accrued interest, as would the B. F. Tilley judgment.

The order of priority with reference to the proceeds of the sale of the Island County property is quite different, as all of the advances under the mortgage were made prior to the filing of the Federal tax liens in that county, February 17, 1959. Hence, the lien of the mortgages in the sum of $56,569.52 was a choate lien before notice of any United States tax lien was filed, and would, therefore, come first—followed by the United States tax liens. The F. B. Tilley

[11] The lien of this judgment would, under the Federal rule, take precedence over United States tax liens, of which notice was not recorded, until after its entry; however, under our decisions it would be subordinate to the lien of the mortgage. Our decisions control the priorities between the mortgage and the judgment.

judgment was not filed in that county. The trial court is affirmed as to order of priority, so far as the proceeds of the sale of the Island County property are concerned.

There is a further question, perhaps academic, as to the status of the $5,600 attorney fee, made a part of the judgment. The United States contends that an attorney's fee for the foreclosure of a prior mortgage, although provided for in the mortgage, cannot come ahead of its liens. We do not have to reach that question, as there is no provision in the mortgages for an attorney's fee.

As we have pointed out, almost $12,000 in attorney's fees was included in the cost of completing the contract and is not questioned. The additional $5,600 had nothing to do with the completion of the contract, but was for securing the present judgment against the Sundbergs and establishing the priority of the various liens against the mortgaged property. The four promissory notes each refer to an attorney's fee, but, as we have already pointed out, this action is not on the notes but to recover the difference between $163,316.75, expended in completing the contract, and $106,747.23 received on account of the contract, i.e., $56,569.52. The basis, if any, for a contractual attorney's fee in this action is found in the application for the bond, which is not in the record.

The pre-trial order stated, and the trial court found, that Oscar Sundberg and Sons by their application for a bond agreed to pay, in the event of action, reasonable attorney's fees. Not being provided for in the mortgages, this attorney's fee became a charge on the mortgaged property solely by reason of the judgment of January 15, 1960, and is subsequent to all other liens so far as the mortgaged property is concerned, except possibly the tax lien for $756.99, of which, so far as the record discloses, no notice has yet been recorded in King County.

The trial court is directed to modify the judgment in the respects herein indicated.

The United States, having secured very substantial relief on this appeal, will recover its costs herein to be taxed.

HILL, J.

WE CONCUR:

FINLEY, C. J.
WEAVER, J.
ROSELLINI, J.
FOSTER, J.

APPENDIX B

Internal Revenue Code of 1954:

SEC. 6321. LIEN FOR TAXES.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.
(26 U.S.C. 1958 ed., Sec. 6321.)

SEC. 6322. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time.
(26 U.S.C. 1958 ed., Sec. 6322.)

SEC. 6323. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.

(a) Invalidity of Lien Without Notice.—Except as otherwise provided in subsection (c), the lien imposed

by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate—

(1) Under state or territorial laws.—In the office designated by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law designated an office within the State or Territory for the filing of such notice; or

(2) With clerk of district court.—In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law designated an office within the State or Territory for the filing of such notice; or

(3) With clerk of district court for District of Columbia.—In the office of the clerk of the United States District Court for the District of Columbia, if the property subject to the lien is situated in the District of Columbia.

(b) Form of Notice.—If the notice filed pursuant to subsection (a) (1) is in such form as would be valid if filed with the clerk of the United States district court pursuant to subsection (a) (2), such notice shall be valid notwithstanding any law of the State or Territory regarding the form or content of a notice of lien.

(c) Exception in Case of Securities.—
(26 U.S.C. 1958 ed., Sec. 6323.)

SEC. 6303. NOTICE AND DEMAND FOR TAX.

(a) General rule.—Where it is not otherwise provided by this title, the Secretary or his delegate shall, as soon as practicable, and within 60 days, after the making of an assessment of a tax pursuant to section 6203, give notice to each person liable for the unpaid tax, stating the amount and demanding payment

thereof. Such notice shall be left at the dwelling or usual place of business of such person, or shall be sent by mail to such person's last known address.

APPENDIX C

Mortgage

THE MORTGAGOR, OSCAR SUNDBERG, the owner of the property hereinafter described, as his sole and separate property, mortgages to AMERICAN SURETY COMPANY OF NEW YORK, in consideration of an advance of the sum of Nine Thousand ($9,000.00) Dollars, advanced on July 14, 1955, with the understanding that the same would be secured by a mortgage, and in further consideration of the advance of Three Thousand and Seventy-Seven and 74/100 ($3,077.74) Dollars made at this time, and further advances to be made, and to secure the payment of Twelve Thousand and Seventy-Seven and 74/100 ($12,077.74) Dollars so advanced according to the terms of promissory note bearing date of July 19, 1955, the following described real estate situated in the County of King, State of Washington, to-wit:

> Lot 11 in Block 8 in Fairview Homestead Association for the Benefit of Mechanics and Laborers, in the City of Seattle, Washington.

And the mortgagor promises and agrees to pay before delinquency all taxes, special assessments and other public charges levied, assessed or charged against said described premises, and to keep all improvements on said described premises insured against loss or damage by fire for its full, insurable value, for the benefit of the mortgagee and to deliver all policies and renewals to the mortgagee.

In case the mortgagor shall fail to pay any installment of principal or interest secured hereby when due or to keep or perform any covenant or agreement aforesaid, then the

whole indebtedness hereby secured shall forthwith become due and payable, at the election of the mortgagee.

DATED this 19 day of July, 1955.

(Signed) OSCAR SUNDBERG (SEA

STATE OF WASHINGTON }
COUNTY OF KING } ss.

On this day personally appeared before me OSCAR SUNDBERG, to me known to be the individual described in and who executed the within and foregoing instrument, and acknowledged that he signed the same as his free and voluntary act and deed for the uses and purposes therein mentioned.

GIVEN under my hand and official seal this 19 day of July, 1955.

EDWARD BORG
Notary Public in and for the State of Washington, residing at Seattle